No. 14-6368

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
- 2015
OFFICE OF THE CLERK

MICHAEL B. KINGSLEY,

Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN IN SUPPORT OF PETITIONER

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

DAVID C. FATHI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St., NW
Washington, DC 20005

LAURENCE J. DUPUIS
AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION
207 East Buffalo Street
Suite 325
Milwaukee, WI 53202

CATHERINE M.A. CARROLL
Counsel of Record
JACQUELYN L. STANLEY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
catherine.carroll@wilmerhale.com

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PRETRIAL DETAINEES ARE PRIMARILY INDIGENT AND NON-VIOLENT 4

II. PRETRIAL DETAINEES FACE ENDEMIC GUARD-ON-DETAINEE VIOLENCE 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Page(s)

Bearden v. *Georgia*, 461 U.S. 660 (1983) 7

Bell v. *Wolfish*, 441 U.S. 520 (1979) 7

Graham v. *Connor*, 490 U.S. 386 (1989) 3, 10

State v. *Nason*, 233 P.3d 848 (Wash. 2010) 9

United States v. *Salerno*, 481 U.S. 739 (1987) 5

DOCKETED CASES

Mitchell v. *City of Montgomery*, No. 2:14-cv-186-MEF, Judgment, Dkt. No. 51 (M.D. Ala. Nov. 17, 2014) 8

Rosas v. *Baca*, No. 12-cv-00428 (C.D. Cal. 2014) 13

Rosas v. *Baca*, No. 12-cv-00428, Order Preliminarily Approving Parties' Proposed Settlement, Dkt. No. 111 (C.D. Cal. Jan. 23, 2015) 13

Varden v. *City of Clanton*, No. 2:15-cv-00034-MHT, Statement of Interest, Dkt. No. 26 (M.D. Ala. Feb. 13, 2015) 6

STATUTES

Civil Rights of Institutionalized Persons Act of 1980

42 U.S.C. §§ 1997 *et seq.* 10

42 U.S.C. § 1997a 10

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

American Bar Association, Criminal Justice Section, *State Policy Implementation Project*, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.pdf (last visited Mar. 9, 2015) 5

American Civil Liberties Union National Prison Project and the ACLU of Southern California, *Cruel and Usual Punishment: How a Savage Gang of Deputies Controls L.A. County Jails* (Sept. 2011), https://www.aclu.org/files/assets/78162_aclu_jails_r2_lr.pdf 12

American Civil Liberties Union of Colorado, *Debtors' Prisons* Case No. 2013-209 (2013), http://aclu-co.org/court-cases/debtors-prisons/ 8

American Civil Liberties Union of Colorado, *End Debtors' Prisons*, http://aclu-co.org/campaigns/end-debtors-prisons/ (last visited Mar. 9, 2015) 8

American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtor's Prisons* (Oct. 2010) 7, 8, 9

TABLE OF AUTHORITIES—Continued

Page(s)

Bronner, Ethan, *Poor Land in Jail as Companies Add Huge Fees for Probation*, NY Times, July 3, 2012, at A1, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_r=0 8

Burdeen, Cherise Fanno, Pretrial Justice Institute, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (Sept. 2009) 6

Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts, SCPS 1990-2004* (Jan. 2009 rev.) 6

Citizens' Commission on Jail Violence, *Report of the Citizens' Commission on Jail Violence* (2012), http://ccjv.lacounty.gov/wp-content/uploads/2012/09/CCJV-Report.pdf 12, 14, 15

Cohen, Thomas H., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (2012) 9

Colbert, Douglas L., *Connecting Theory and Reality: Teaching* Gideon *and Indigent Defendants'* Non-Right *to Counsel at Bail*, 4 Ohio State J. Crim. L. 167 (July 2006) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Holder, Eric, Attorney General, U.S. Department of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice 5

Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low-Income Nonfelony Defendants in New York City* (2010) 6, 7, 9

James, Doris J., Bureau of Justice Statistics, U.S. Department of Justice, *Profile of Jail Inmates, 2002* (2004) 5

Letter from Grace Chung Becker, Acting Assistant Attorney General, Civil Rights Division to Todd H. Stroger, Cook County Board President, re Cook County Jail, Chicago, Illinois (July 11, 2008), http://www.justice.gov/crt/about/spl/documents/CookCountyJail_findingsletter_7-11-08.pdf 13, 14, 15, 16

Letter from USAO for the Southern District of New York to Mayor Bill de Blasio et al. re CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island (Aug. 4, 2014) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Levingston, Kirsten D. & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, Clearinghouse Rev. J. Poverty L. Pol'y 187 (July-Aug. 2007) 7

Manns, Jeffrey, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 Cardozo L. Rev. 1947 (2005) 6

Memorandum of Agreement Between the United States and Los Angeles County, California, Regarding Mental Health Services at the Los Angeles County Jail (2002), http://www.justice.gov/crt/about/spl/documents/lacountyjail_mh.php 12, 13

Minton, Todd D. & Daniella Golinelli, Bureau of Justice Statistics, U.S. Department of Justice, *Jail Inmates at Midyear 2013—Statistical Tables* (rev. Aug. 12, 2014) 4

Subramanian, Ram, et al., VERA Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* (2015) 4, 5, 8, 9

Winerip, Michael & Michael Schwirtz, *Even as Many Eyes Watch, Brutality at Rikers Island Persists*, N.Y. Times, Feb. 21, 2015, http://www.nytimes.com/2015/02/22/nyregion/even-as-many-eyes-watch-brutality-at-rikers-island-persists.html 11

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU of Wisconsin is one of its statewide affiliates. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae.

The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of incarcerated persons, including pretrial detainees. In furtherance of that goal, the National Prison Project has brought numerous cases on behalf of prisoners seeking to ensure that conditions of confinement, including in city and county jails, comply with the Constitution. Similarly, the ACLU of Wisconsin has litigated conditions of confinement in county jails in Wisconsin, including an ongoing class action involving the Milwaukee County Jail. This case is of significant interest to the ACLU in light of its potential consequences for the ability of pretrial detainees to protect themselves from the objectively unreasonable abuse and violence that pervades city and county jails across the Nation.

---

[1] Letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The ACLU agrees with petitioner that the Constitution protects pretrial detainees from the government's use of objectively unreasonable force, regardless whether the perpetrator intended to deprive the victim of his rights or was recklessly indifferent to such a deprivation. Rather than repeat the doctrinal arguments petitioner advances, this brief seeks to provide important context for the Court's deliberations by demonstrating two key facts about pretrial detention that weigh in favor of petitioner's position. First, a great proportion of pretrial detainees stand charged with nonviolent offenses and remain in custody—despite being presumed innocent—not because of any propensity for violence, disruption, or misconduct, but because their indigence precludes them from securing their own freedom before trial. Second, a culture of endemic guard-on-detainee violence characterizes many of our Nation's pretrial-detention facilities, underscoring both the need for strong constitutional protection of detainees and the inadequacy of subjective intentions as a reliable source of that protection.

I. An examination of the pretrial-detainee population confirms that financial security is a significant, and often dispositive, indicator of whether a defendant will be forced to await trial behind bars. Hundreds of thousands of Americans are currently detained in pretrial custody, many of whom remain in jail not because they have been found to represent a flight risk or danger to the public, but because they lack the financial resources necessary to secure their release. Put simply, they cannot afford to pay their bail or the fees they have incurred as a result of the legal process. Even bail assessments that are legally permissible can in practice be excessive for the poorest of defendants.

Pretrial detention thus disproportionately affects the indigent—and in turn disproportionately affects racial and ethnic minorities—without regard to any propensity for disruption or violence. Reflecting the population of arrestees as a whole, many if not most pretrial detainees have been accused only of nonviolent crimes. Another significant portion of the detainee population consists of individuals who have not been accused of any crime at all, but rather have been jailed for failure to pay debts or fees associated with the criminal process. The standard governing excessive-force claims should not be made more difficult simply because these defendants are too poor to avoid detention. For defendants who remain free from physical custody while awaiting trial, the Constitution protects against unreasonable, physically abusive government conduct without regard to the subjective motivations behind an assault. *See Graham* v. *Connor*, 490 U.S. 386 (1989). Predominantly indigent, non-violent pretrial detainees—who have been found guilty of no crime and are equally entitled to the presumption of innocence—should enjoy the same protection against the use of objectively unreasonable force.

II. The need for such protection is underscored by evidence of rampant and severe guard-on-detainee brutality in many pretrial-detention facilities across the country. While it comes as no surprise that jail is unpleasant, the prevalence and degree of violence and guard-on-detainee abuse in this country's jails—much of which goes underreported—commands attention. Investigative reports by the Department of Justice, studies by the ACLU and other investigative and scholarly works reveal widespread abuses at pretrial-detention facilities from Rikers Island to the Cook County Jail to the Los Angeles County Jail system. In particular,

these studies reveal that presumptively innocent pretrial detainees often find themselves enmeshed in a culture of violence, where excessive force is so common that it can cease to seem noteworthy, perhaps most of all to those perpetrating it.

Given the prevalence of violence in these facilities—and its tendency to skew a perpetrator's subjective sense of reasonableness—a standard of objective reasonableness should govern claims challenging the use of force against detainees who are too poor to afford their own pretrial freedom, but must await trial in environments rife with guard-on-detainee violence. The prevalence of such violence, and the difficulty of bringing it under control, counsel against any loosening of that constitutional standard.

ARGUMENT

I. PRETRIAL DETAINEES ARE PRIMARILY INDIGENT AND NON-VIOLENT

County and city jails in the United States are home to more than 700,000 incarcerated individuals, who spent an average of 23 days in jail in 2013. *See* Minton & Golinelli, Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013—Statistical Tables* 1 (rev. Aug. 12, 2014) ("*2013 Statistical Tables*"); Subramanian et al., VERA Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 10 (2015) ("VERA Report"). The majority of the jail population—over 60 percent as of 2013—are pretrial detainees who have not been tried or convicted on a current charge. *2013 Statistical Tables* 1.

Most pretrial detainees have not been confined out of concern for possible dangerousness or risk of flight. Reflecting the overall population of jailed persons—of

which approximately 75 percent were in custody for nonviolent crimes—only a fraction of pretrial detainees face charges for violent crimes. *See* Eric Holder, Att'y Gen., U.S. Dep't of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice; *see also* VERA Report 5 (citing James, Bureau of Justice Statistics, U.S. Dep't of Justice, Profile of Jail Inmates, 2002, at 3 (2004)). The remainder stand accused of property-related and other nonviolent crimes, or, in many cases, the "offense" of owing someone (typically the government) money they cannot afford to pay. *Id.* According to an American Bar Association study, two-thirds of pretrial defendants "pose no significant risk to themselves or the community ... [and] represent[] a low risk of flight." American Bar Association, Criminal Justice Section, *State Policy Implementation Project* 2, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.pdf (last visited Mar. 9, 2015).

Instead, the chief factor distinguishing most pretrial detainees from defendants who have been released to await trial on bail is not a greater propensity for violence or flight, but simply indigence. As one study recently found, "[m]oney, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial." VERA Report 32.

In many cases, defendants face pretrial detention simply because they cannot afford to post bail. Although the Eighth Amendment prohibits imposition of "excessive" bail, *see United States* v. *Salerno*, 481 U.S. 739, 744-745 (1987), courts retain significant discretion to set bail amounts. In the exercise of that discretion, courts often set those amounts at levels many

defendants cannot afford. *See* Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 Cardozo L. Rev. 1947, 1958-1962 (2005).[2] For example, the Department of Justice recently condemned the use of so-called "fixed-bail" procedures, which in practice "essentially mandate pretrial detention for anyone who is too poor to pay [a] predetermined fee." Statement of Interest, at 9, Dkt. No. 26, *Varden* v. *City of Clanton*, No. 2:15-cv-00034-MHT (M.D. Ala. Feb. 13, 2015). In a study of detainees charged with felonies in state court, the Bureau of Justice Statistics recently found that as many as five out of six detainees were given the opportunity to be released on bail pending trial but could not afford the amount of bail set. Burdeen, Pretrial Justice Institute, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* 5 (Sept. 2009) (citing Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts, SCPS 1990-2004* (Jan. 2009 rev.)).

A study of non-felony defendants in New York City revealed similar patterns. In 2008, fewer than 18 percent of non-felony defendants in New York City courts posted bail when it was set at $500; only 11.3 percent posted bail when it was set at $1,000. Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low-Income Nonfelony Defendants in New York City* 21 (2010) ("*Price of Freedom*"). The remaining 80-plus percent of defendants who did not pay the $500 or $1,000 presumably were not willfully withholding it in order to be sent to jail; more likely, they simply

---

[2] Indigent defendants often are not represented by counsel at bail hearings. *See* Colbert, *Connecting Theory and Reality: Teaching* Gideon *and Indigent Defendants'* Non-Right *to Counsel at Bail*, 4 Ohio State J. Crim. L. 167, 170-171 (July 2006).

could not afford it. As a result, they spent an average of 15.7 days behind bars. *Id.* at 23.

Another significant portion of the county and city jail population consists of individuals who have been detained simply because they have failed to pay debts or judicially imposed fees, fines, costs, or restitution known as legal financial obligations (LFOs). *See* American Civil Liberties Union, *In For a Penny: The Rise of America's New Debtors' Prisons* 5 (Oct. 2010) ("*In For a Penny*"). Although this Court has long recognized "debtors' prisons" to be unconstitutional, *see Bearden* v. *Georgia*, 461 U.S. 660 (1983), several studies have documented the extent to which indigent defendants are detained for failure to pay such costs.[3] For example, an ACLU investigation of practices in five States found widespread increases in the assessment and collection of LFOs from incarcerated persons, likely a reaction to a struggling economy and resulting need for new sources of cash for local governments. *See In For a Penny* 5-9. Whatever the reason, the outcome is that indigent defendants are repeatedly arrested and detained for failure to pay LFOs, warrant fees, and even "booking and jail 'pay-to-stay' fees"—a process through which detainees are invoiced for the costs of room and board, medical and dental treatment, and random drug testing during the detention period. *Id.* at 10. These detainees "accumulate debt layer by layer," "creat[ing] an untenable situation." Levingston & Turetsky,

---

[3] We do not suggest that the doctrinal analysis of excessive-force claims brought by debtors who have been jailed as punishment for contempt of court necessarily follows the analysis applicable in pretrial-detainee cases. *See Bell* v. *Wolfish*, 441 U.S. 520, 537 n.17 (1979). But we include a discussion of individuals who have been detained as debtors to provide a complete description of the predominantly indigent and nonviolent jail population.

Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry, Clearinghouse Rev. J. Poverty L. Pol'y 187, 188 (July-Aug. 2007). And when those defendants are released from detention, they are likely to be poorer than when they went in and thus increasingly vulnerable to being incarcerated again. VERA Report 16.

Like other pretrial detainees, individuals who have been jailed for failure to pay their debts thus predominantly pose no particular threat to jailhouse security, but are simply too poor to avoid detention. Aggressive collection practices can increase the likelihood that such nonviolent, indigent individuals will end up in pretrial-detention facilities. *See In For a Penny* 59. In certain Alabama localities, for example, debt collectors have "ma[d]e their money by adding fees onto the bills of the defendants," incentivizing their continued billing and jailing of indigent defendants. Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, NY Times, July 3, 2012, at A1, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_r=0; *cf.* Judgment, Dkt. No. 51, *Mitchell* v. *City of Montgomery*, No. 2:14-cv-186-MEF (M.D. Ala. Nov. 17, 2014) (approving settlement agreement in suit by citizens of Montgomery who had been jailed for failure to pay traffic fines in which City of Montgomery agreed to implement certain reforms). Similarly, in Colorado, before the State changed its law, many courts issued so-called "pay-or-serve" warrants, under which debtors were required either to pay the full amount of their outstanding debts or to "pay down" those debts by serving time in jail. American Civil Liberties Union of Colorado, *Debtors' Prisons*, Case No. 2013-209 (2013), http://aclu-co.org/court-cases/debtors-prisons/; *see* American Civil

Liberties Union of Colorado, *End Debtors' Prisons*, http://aclu-co.org/campaigns/end-debtors-prisons/ (last visited Mar. 9, 2015). And before it was deemed a violation of due process, a Spokane County, Washington policy known as "auto-jail" obligated debtors to turn themselves in to jail if they could not pay outstanding debts. *In For a Penny* 65-67; *see also State* v. *Nason*, 233 P.3d 848, 848-849 (Wash. 2010).

Correlation between a defendant's indigence and his race or ethnicity means that the disproportionate impact of pretrial detention on the indigent in turn contributes to racial and ethnic disparities in city and county jails. While approximately 65 percent of white/non-Hispanic and Asian/Pacific Islander felony defendants secured pretrial release in the federal court system, only 43 percent of black/non-Hispanic defendants and 20 percent of Hispanic defendants secured such release. Cohen, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, at 10 (2012). Black men in particular are disproportionately detained before trial due to an inability to post bail their white counterparts can more often afford. VERA Report 15. In New York City jails, for example, "[p]retrial punishment in the form of detention because of inability to post bail is endured primarily by blacks and Hispanics." *Price of Freedom* 47.

The majority of the U.S. jail population thus comprises mostly indigent detainees and debtors, disproportionately of racial or ethnic minorities, a significant proportion of whom have not been charged with any crime of violence and are not thought to pose any particular danger to the community but cannot afford to prevent their own detention. Were these individuals able to secure their own release, they would enjoy

significant constitutional protection from objectively unreasonable uses of force by the government. In particular, a defendant who remains free on bail while awaiting trial on a pending charge would not be required to meet the more difficult Eighth Amendment standard, which includes a showing of malicious intent, if he were subjected to objectively unreasonable police violence. *See Graham* v. *Connor*, 490 U.S. 386, 395 (1989). A defendant's right to protection from such violence should not be diminished simply because he cannot afford to avoid detention pending trial.

II. Pretrial Detainees Face Endemic Guard-On-Detainee Violence

As documented by the U.S. Department of Justice and others, guard-on-detainee violence has persisted as a significant and intractable problem in U.S. jails.[4] The frequent—and underreported—abuse of detainees by jailhouse staff has fostered cultures of excessive force in jails across the country, threatening pretrial detainees' health, safety, and constitutional rights. At the same time, these cultures of violence can distort the perpetrators' subjective sense of reasonableness, making a subjective recklessness or malice standard a particularly inapt tool for curbing jailhouse violence.

In the New York City municipal jail system, the prevalence of guard-on-detainee violence at Rikers Island—which houses primarily pretrial detainees, including adolescents—provides a notorious example.

---

[4] DOJ investigates and prosecutes patterns of violence and other constitutional violations at detention facilities pursuant to the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997 *et seq.* ("CRIPA"). *Id.* § 1997a. Much of the information presented below derives from materials generated through such CRIPA investigations.

The U.S. Attorney for the Southern District of New York recently investigated violence at Rikers, focusing on staff-on-detainee brutality. *See* Letter from USAO for the Southern District of New York to Mayor Bill de Blasio et al. re CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island (Aug. 4, 2014).[5] The investigation revealed that guards routinely employed excessive force and sought to justify those uses of force by making false claims about detainee resistance or misconduct. *Id.* at 8-9, 10-20. Guards' decisions to use force in the first place were often inappropriate or inadequately reasoned. Staff-perpetrated violence ranged from "casual and spontaneous" to "premeditated and severe." *Id.* at 23. Moreover, some staff displayed a "combative approach and tendency to aggressively push inmates" in a manner reflecting a "deep-seated culture of violence" and resulting in perpetual fear among the jailed. *Id.* at 3, 19.

Although multiple public reports have exposed egregious practices at Rikers, the extent of the violence has not subsided. As of February 2015, "violence [at Rikers] has continued largely unabated, despite extraordinary levels of outside scrutiny [and] a substantial commitment ... by [the government of New York City]." Winerip & Schwirtz, *Even as Many Eyes Watch, Brutality at Rikers Island Persists*, N.Y. Times, Feb. 21, 2015, http://www.nytimes.com/2015/02/22/nyregion/even-as-many-eyes-watch-brutality-at-rikers-island-persists.html.

Across the country, the Los Angeles County Jail system—the largest of its kind in the country—has

---

[5] The U.S. Attorney's investigation at Rikers focused mainly on treatment of incarcerated adolescent males, but its findings shed light on conditions at the facility as a whole.

been the subject of similar scrutiny. Pretrial detainees account for approximately 45 percent of the L.A. County Jail system population, and they face an environment pervaded with brutality and abuse. According to independent investigative reports by the Citizens' Commission on Jail Violence and the ACLU, guards in the L.A. County system have employed extreme brutality and violence to discipline the incarcerated, targeting the mentally ill in particular. *See* Citizens' Commission on Jail Violence, *Report of the Citizens' Commission on Jail Violence* (2012), http://ccjv.lacounty.gov/wp-content/uploads/2012/09/CCJV-Report.pdf ("CCJV Report"); American Civil Liberties Union National Prison Project and the ACLU of Southern California, *Cruel and Usual Punishment: How a Savage Gang of Deputies Controls L.A. County Jails* (Sept. 2011), https://www.aclu.org/files/assets/78162_aclu_jails_r2_lr.pdf ("ACLU L.A. County Jails Report"). Witnesses reported that force was often used "to ensure compliance" with staff orders, "even though no threat was present." CCJV Report 31. For example, in one reported incident when a detainee failed to obey a deputy's order, "the deputy walk[ed] up to the inmate and smash[ed] his head into the wall." *Id.* "The inmate then fell to the floor and the deputy began kicking the inmate. Other deputies joined the altercation as well." *Id.*

Such incidents, many of which have resulted in severe injury or even death to detainees, have persisted for years notwithstanding a 2002 Memorandum of Agreement with DOJ, in which the L.A. County Jail system agreed to implement extensive reforms. *See* ACLU L.A. County Jails Report 8; Memorandum of Agreement Between the United States and Los Angeles County, California, Regarding Mental Health Services at the Los Angeles County Jail (2002), http://www.

justice.gov/crt/about/spl/documents/lacountyjail_mh.php. Although these proposed reforms focused on mental-health services, they touched also on extensive flaws in treatment of detainees generally and oversight of jail staff. Nonetheless, reform efforts did not succeed. More recently, the ACLU brought suit on behalf of two pretrial detainees who were brutally beaten by deputies at L.A. County Jails. *See Rosas* v. *Baca*, No. 12-cv-00428 (C.D. Cal. 2014). As a result of that lawsuit, the Jail agreed to implement comprehensive reforms to correct endemic violence. *See* Order Preliminarily Approving Parties' Proposed Settlement, Dkt. No. 111, *Rosas* v. *Baca*, No. 12-cv-00428 (C.D. Cal. Jan. 23, 2015). Whether those efforts will succeed where previous ones have failed remains to be seen.

Problems similar to those found at Rikers and L.A. County have been identified at Cook County Jail in Illinois—the largest single-site county jail in the United States. Out of approximately 9,800 total male and female prisoners in the jail, most are pretrial detainees. *See* Letter from Grace Chung Becker, Acting Assistant Attorney General, Civil Rights Division to Todd H. Stroger, Cook County Board President, re Cook County Jail, Chicago, Illinois 1-3 (July 11, 2008), http://www.justice.gov/crt/about/spl/documents/CookCountyJail_findingsletter_7-11-08.pdf ("Cook County Findings Letter"). According to DOJ findings, detainees at Cook County were "regularly subjected to inappropriate and excessive uses of physical force." *Id.* at 10. Cook County officers "too often respond[ed] to inmates' verbal insults or failure to follow instructions by physically striking inmates, most often with the active assistance of other officers, even when the inmate present[ed] no threat to anyone's safety or the security of the facility." *Id.* DOJ has made clear that "[a] verbal taunt from an

inmate ... may appropriately result in disciplinary action, but it should not require a physical response [from a guard]." *Id.* Physical responses by Cook County guards were nonetheless routine in practice, regardless of the nature of the provocation. *See id.* at 10-12. On some occasions, guard-on-detainee violence could be provoked by even less than a verbal insult. In one instance described by DOJ, for example, a detainee who continued to tap repeatedly on the wall during a strip-search after being instructed to stop tapping was "slammed ... on top of a cart and against the wall" and "pulled into the hallway where ... [h]e was hit in the face, dragged by his hair, choked, and beaten." *Id.* at 13.

The guard-on-detainee violence that characterizes jail systems like Cook County, L.A. County, and Rikers has proved difficult to control in large part because of its deep roots in jailhouse culture. In many jails, "tolerance for excessive force used by at least some deputies ... has the danger of leading to ... 'abuses of force [that become] ... so 'normalized' that deputies can no longer perceive them as abusive.'" CCJV Report 98-99. Endemic violence thus "perpetuate[s] a damaging culture that can ultimately affect even those deputies ... who do not subscribe to these views and are intent on doing the right thing." *Id.*

The Citizens' Commission on Jail Violence found that in L.A. County jails, for example, department personnel applied for years what they referred to as a "force first" approach, under which "force has been viewed by some Custody deputies as a means to control the inmate population rather than a last resort response." CCJV Report 97. Within that system, "deputy reactions were often disproportionate and excessive." *Id.* Indeed, "in nearly three out of five force incidents, [L.A. County Sheriff's Department] personnel

used force against an inmate who was *not* engaged in an assault and who may have done nothing more than passively disobey an instruction." *Id.* at 39. A former captain at the jail described this as a "mindset ... among the deputies ... that force was necessary to assert authority and show inmates who was in charge." *Id.* at 97.

When objectively unreasonable uses of force pervade the jail environment, that culture shapes guards' subjective perceptions of the appropriateness of violence. At Cook County Jail, for example, according to "a top security administrator," a "'culture of abusing inmates'" existed at the jail, and unnecessary uses of force by guards often went unchecked. Cook County Findings Letter 10. Indeed, DOJ uncovered multiple instances in which force was used a means of punishment or retribution against detainees, including mentally ill individuals who could do little to defend themselves. *Id.* at 14-16. Similarly, in L.A. County, officials in charge of the jail system concealed incidents of violence for decades and disciplined guards for use of "unreasonable" force in fewer than one percent of the 5,630 use-of-force incidents that occurred over a six-year period. CCJV Report 40-41; *see also id.* at 5. The jail system's own finding after an internal investigation—that fewer than one of every one-hundred uses of force was "excessive"—"paint[s] a picture of an inadequate investigatory and disciplinary system" and underscores why protection of the safety and constitutional rights of pretrial detainees should not turn on the subjective perceptions of jail guards whose attitudes toward violence are shaped by such an environment. *Id.* at 41.

Inadequacy of oversight and accountability compounds the problem of rampant jailhouse violence and further distorts subjective understandings of the

proper use of force. In Cook County, for example, if guards reported incidents of violence at all, they regularly failed to document the full extent of the force used. Cook County Findings Letter 18-19. Moreover, Cook County Jail "ha[d] no tracking or early warning system to identify those officers ... whose actions [had] elicited the most complaints of excessive force ... or injuries." *Id.* at 20. When officials did investigate potentially excessive uses of force within the jail system, they did so incompletely, failing to ask key questions such as how the incident had occurred or why the detainee was injured. *Id.* at 22.

Pretrial detainees, a great proportion of whom are nonviolent individuals who pose no particular danger to jailhouse safety and order—and many of whom would likely be free on bail but for their indigence—thus face a significant possibility that they will be the victims of violence at the hands of jailhouse staff. When that violence rises to the level of objective unreasonableness, as it does all too often in many of the Nation's largest pretrial-detention facilities, the constitutional standard should not be relaxed to accommodate it. And the perpetrator should not be able to evade liability by invoking a subjective perception of violence that reflects an environment in which such violence is par for the course.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

DAVID C. FATHI
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th St., NW
Washington, DC 20005

LAURENCE J. DUPUIS
AMERICAN CIVIL LIBERTIES
UNION OF WISCONSIN
FOUNDATION
207 East Buffalo Street
Suite 325
Milwaukee, WI 53202

CATHERINE M.A. CARROLL
Counsel of Record
JACQUELYN L. STANLEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
catherine.carroll@wilmerhale.com

March 2015